



ALAN WILSON  
ATTORNEY GENERAL

July 21, 2011

Susan O. Porter, Esquire  
General Counsel  
South Carolina Law Enforcement Division  
P.O. Box 21398  
Columbia, SC 29221-1398

Dear Ms. Porter:

In a letter to this office, you reference that the South Carolina Law Enforcement Division (“SLED”) is working to become compliant with the Federal Sex Offender Registration and Notification Act (“SORNA”). You explain that one of the requirements of SORNA is the classification of certain sex offenders into “Tier” categories.

In opinions dated May 30, 2008, and July 7, 2011, we discussed applicable sex offenses in South Carolina and classified them as either Tier II or Tier III federal offenses, as defined by SORNA.<sup>1</sup> Specifically, you ask this office to advise SLED regarding the proper Tier classification for the offense of “Committing or attempting lewd act upon child under sixteen.”

#### Law/Analysis

Pursuant to S.C. Code Ann. §16-15-140:

[i]t is unlawful for a person over the age of fourteen years to wilfully and lewdly commit or attempt a lewd or lascivious act upon or with the body, or its parts, of a child under the age of sixteen years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of the person or of the child. . . .

A person over the age of fourteen commits or attempts to commit the offense of a lewd act upon a child when that person: (1) willfully, (2) and lewdly, (3) with the intent of arousing, appealing to, or gratifying, (4) the lust or passions or sexual desires of the actor or the child, (5) commits or attempts to commit, (6) a lewd or lascivious act, (7) upon the body or with the body of a child under the age of sixteen. No “violent injury” is necessary for the commission of this offense. Sexual fondling of a child falls within the term “lewd or lascivious act.” See Terry v. State, 383 S.C. 361, 680 S.E.2d 277, 284

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<sup>1</sup>For an explanation of SORNA’s Tier categories and statutory requirements, we cite to our discussion in the July 7, 2011, opinion.

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(2009) [any inappropriate touching of a minor under sixteen is sufficient evidence of a lewd act charge]; South Carolina DSS v. Forrester, 282 S.C. 512, 320 S.E.2d 39, 43 (Ct. App. 1984) [evidence that the defendant fondled the victims' breasts was sufficient]; see also State v. Norton, 286 S.C. 95, 332 S.E.2d 531, 533 (1985) [dismissing defendant's double jeopardy claim and holding the defendant could be reindicted for committing a lewd act upon a minor after the trial court previously directed a verdict of acquittal on a charge of first degree criminal sexual conduct with a minor; the Supreme Court distinguished the elements of both offenses, and it noted the crime of committing a lewd act on a minor does not require a "sexual battery"<sup>2</sup>].

### Conclusion

Based upon our reading of SORNA and South Carolina law, and in light of our prior opinions, we advise that a conviction under §16-15-140, and if the victim is under the age of 13, would classify as a Tier III offense.<sup>3</sup> A conviction under this provision where there is a "sexual act" as defined by 18 U.S.C. §2246, *i.e.*, naked genitalia, and if the victim is 13 to 15 years old, would classify as a Tier III offense. A conviction under this provision where there is "sexual contact" as defined by 18 U.S.C. §2246, and the sexual contact is not of the naked genitalia and the victim is 13 to 15 years old, would classify, at a minimum, as a Tier II offense. In sum, the classification of a conviction for this offense depends upon the particular conduct involved in each case and the age of the victim as set forth above.

This is our best effort to identify whether the above offense is similar to the referenced federal offenses. As stated in our earlier opinions, we cannot provide an absolute answer applicable to all situations. Additionally, whether the United States Department of Justice, Office of Justice Program, Office of Sex Offender Sentencing, Monitoring, Apprehending, Registering, and Tracking ("SMART"), upon further review of the SLED Checklist of South Carolina offenses, will determine that SLED is in compliance with SORNA guidelines is beyond the scope of an opinion of this office.

If you have any further questions, please advise.

Very truly yours,



N. Mark Rapoport  
Senior Assistant Attorney General

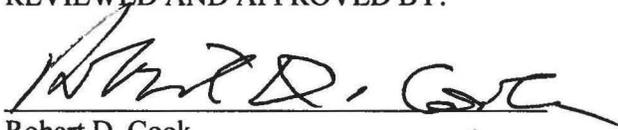
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<sup>2</sup>Section 16-3-651 (h) defines "sexual battery" as "sexual intercourse, cunnilingus, fellatio, anal intercourse, or any intrusion, however slight, of any part of a person's body or of any object into the genital or anal openings of another person's body, except when such intrusion is accomplished for medically recognized treatment or diagnostic purposes."

<sup>3</sup>As we stated in the opinion dated July 7, 2011, any "sexual act" or, for that matter, "sexual contact," as defined by 18 U.S.C. §2246, against a minor under 13 years of age would classify as a Tier III offense.

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REVIEWED AND APPROVED BY:

A handwritten signature in black ink, appearing to read "R. D. Cook", written over a horizontal line.

Robert D. Cook  
Deputy Attorney General